No. 3205

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TWENTY ONE MINING COMPANY
(a corporation),

Appellant,

vs.

ORIGINAL SIXTEEN TO ONE MINE, INC.
(a corporation),

Appellee.

APPELLEE'S REPLY TO APPELLANT'S REPLY BRIEF.

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Not only is appellee vitally interested in the decision of the case at bar, but its outcome is of the utmost economic importance to the mining industry of the entire West. The filing of a brief on behalf of appellee in reply to the second brief filed by appellant would otherwise be a clear infliction upon an already overpatient court.

I.

THE BEARING ON THE QUESTION HERE INVOLVED OF WORK ALREADY PERFORMED BY APPELLEE OUTSIDE OF THE WALLS OF THE VEIN BUT IN ITS IMMEDIATE VICINITY.

Counsel for appellant have commented on the fact that at the oral argument one of the learned

judges inquired what bearing work already performed by appellee had on the determination of the question whether or not an injunction should issue preventing future work and they are correct in stating that the only bearing which such work can have is, in a sense, as a measure of the work contemplated by appellee in the future and to prevent which this injunction was sought by appellant. To make the situation clearer by a concrete illustration: An examination of the cross section diagram (p. 51 of the printed record) discloses the relation of the vein to the various workings and shows appellee's main working shaft sunk immediately beneath the vein throughout its lower extent and in close touch with it throughout. This shaft was driven slightly below the vein for several reasons, to wit: (1) because the vein was faulted in its upper portion, each fault dislocating the vein so that its lower extension was found dropped down with reference to the upper segment and it was believed the same condition would continue below; (2) because the vein flattened materially in dip below the 250 foot level and it was necessary to secure a more uniform grade, and (3) because the footwall rock immediately below the vein was firmer and safer and necessitated less timbering than if the shaft were run on the vein itself. All of these reasons contributed to make it reasonably necessary to drive this main working shaft in the footwall for this distance as is stated in the many affidavits filed in behalf of appellee and

none of which are contradicted by anything appearing in the record. It will be noted that at its present lower extremity this shaft is approaching the vein and is within five feet of the footwall of the vein. It is of the utmost importance that appellee should be able to continue this main working shaft on a uniform grade through this narrow width of intervening barren country rock until it reaches the vein again, otherwise the lower half of this main working shaft constructed at the expense of thousands of dollars will be a total economic loss and will have to be duplicated and appellee thus penalized to the extent of such expenditure. This, of course, is the result which appellant seeks to attain by this appeal.

Appellee will also have to construct other ore chutes in the hanging wall of the vein similar to the ore chute at the 300 level, if it is to operate its mine with reasonable economy. Appellee freely admits the necessity for these workings and that it will have to continue them if it is to operate its mine profitably and advantageously. Hence, it welcomes a decision by this court which will announce the law applicable to such workings under similar circumstances.

II.

THE STATUTE GRANTING THE EXTRALATERAL RIGHT GRANTS NOT ONLY THE POSSESSION BUT THE ENJOYMENT OF THE VEIN.

Answering opposing counsel's discussion of Proposition I (p. 2 of appellant's reply brief), we

evidently failed in our opening brief to point out clearly enough to convince opposing counsel that the right of possession of a thing and the right of enjoyment of a thing are two very distinct rights. A trustee may have possession of property but he may have no right of enjoyment of that property. But if the right of enjoyment is distinctly granted in so many words, then the grantee may do everything which is reasonably necessary to render effective this right of enjoyment.

Appellant's discussion numbered II found on pages 4-5 of its reply brief is also answered by the mere statement that appellee is not attempting to engraft on or add any new rights to the statute for the statute distinctly grants the specific right of reasonable enjoyment here contended for.

Appellant also fails to recognize this same distinction in its discussion of the *Drum Lummon* case, found on pages 6-7 of its reply brief. Not only does the statute give the locator the vein on its dip, but as Judge Brewer said, it also gives him "the right to pursue a vein". A grant of fish or game or any other specific thing that may be found upon another man's land in and of itself is of no value if it be not accompanied by a reasonable right to go upon such land and possess and enjoy the thing granted. And when opposing counsel argue, as they have, that if a vein pinches down to a knife blade or is faulted or otherwise dislocated locally so that it is impossible to physically possess and enjoy that vein without cutting into country rock and that,

therefore, the right granted by the statute is totally defeated and destroyed, they are ignoring the great mass of authority on the subject of grants by implication that has been piled up for more than two centuries past.

III.

THE EXTRALATERAL GRANT CONTAINED IN THE MINING STATUTE IS AS COMPLETE AND EFFECTIVE A GRANT AS WOULD BE THE SAME GRANT BETWEEN PRIVATE PARTIES.

In discussing this proposition on pp. 9-11 of appellant's reply brief, opposing counsel avoid committing themselves to the idea that the title to a mining location is virtually founded on a grant from the federal government. In our opening brief, we have already cited *Gwillim v. Donnellan,* 115 U. S. 45, 49, to the effect that a location "has the effect of a grant by the United States of the right of present and exclusive possession". See also same language in *Manuel v. Wolff,* 152 U. S. 505, 510-511.

In *O'Connell v. Pinnacle Gold Mines*, 9th C. C. A.; 140 Fed. 854, 855-6, Judge Gilbert points out that "in the mining laws the *grant*" gives to the locator "a higher estate than is given to the settler or locator under any other of the land laws". The Court of Appeals of the 8th Circuit has said "the title to a well-located mining claim * * * rests upon a statutory grant" (*Oscamp v. Crystal River M. Co.,* 58 Fed. 293, 296; and "is confirmed by ex-

press statutory grant'' (*Burns v. Clark,* 133 Cal. 534, 635.

But opposing counsel would differentiate between a private grant and a statutory grant, urging that the former carries rights by implication which the latter does not. They ignore entirely the authorities cited on pages 13-17 of appellee's opening brief which lay down the general rules of interpretation of this public mining grant, to wit:

> The locator should receive the full benefit of the statute in its true spirit and intent * * * and the general principle of interpretation should be to preserve in all cases the essential right given by the statute;
>
> The disposal of the mines and minerals is the primary purpose of the statute and in its interpretation this must be recognized and given effect, and
>
> Questions of doubtful construction are not to be resolved against it, etc.

It is unthinkable that the sovereign power should grant a right, which the courts say should be liberally construed, and that such grant should not carry with it the same incidental rights which are ordinarily enjoyed by grantees holding under private grants.

As Judge Hallett, one of our great Western mining jurists, said in *Harris v. Equator Mining Company,* 8 Fed. 863, 866:

> "In general, we apply to mines in the public lands the rules applicable to real property * * *"

If this be good law, and it has both logic and precedent to support it, then there is no valid reason why the same rules which govern in the mining of veins severed from the surface under private grants should not control in the case of grants acquired by a compliance with the mining statutes.

That statutory enactments and grants are to be construed so that they shall be held to confer by implication everything necessary and requisite to make the grant effectual or requisite to accomplish the object of the grant see *Lewis' Sutherland on Statutory Construction* (2nd ed.):

> "Statutes are not, and cannot be, framed to express in words their entire meaning. They are framed like other compositions to be interpreted by the common learning of those to whom they are addressed; especially by the common law, in which it becomes at once enveloped, and which interprets its implications and defines its incidental consequences. That which is implied in a statute is as much a part of it as what is expressed." (p. 933)
>
> "Wherever the provision of a statute is general, *everything which is necessary to make such provision effectual is supplied by the common law and by implication.* A grant of lands from the sovereign authority of a state to individuals to be possessed and enjoyed by them in a corporate capacity confers a right to hold in that character. A legislative grant made to an alien, by necessary implication confers the right to receive and enjoy without prejudice on account of alienage." (p. 939)
>
> "*When a statute gives a right* or imposes a duty, *it also confers by implication the power*

> *necessary to make the right available* or to discharge the duty." (p. 947)

> "What is clearly implied is as much a part of the law as what is expressed."
>
> *Luria v. United States,* 231 U. S. 9, 24.

> "What is implied in a *statute,* pleading, contract, or will is as much a part of it as what is expressed."
>
> *United States v. Babbitt,* 66 U. S. 55, 61.

Same language used in *Buckley v. United States,* 86 U. S. 37, 40, construing a private instrument, to which the court adds:

> "Human affairs are largely conducted upon the principle of implications."

It will be noted that no distinction is made in these cases between statutes and private instruments, for they are classed together.

Any other conclusion would do violence to plain, everyday common sense, and opposing counsel's statement found on page 11 of their reply brief "that the rule of implication applied to private grants cannot on principle or reason have any applicability to locations made under the Mineral Act" is, we respectfully submit, diametrically opposed to principle, reason and precedent.

To paraphrase the language of the Supreme Court of the United States (*Ex parte Yarbrough,* 110 U. S. 651, 658; *South Carolina v. United States,* 199 U. S. 437, 451) used in similar cases involving an interpretation of constitutional powers:

> 'It is an old argument often heard, often repeated, *and in this court never assented to,* that when the question of the exercise of a necessary incidental right arises, the advocate of the existence of such right must be able to place his finger on the words which expressly grant it.'.

Therefore, the authorities cited on pages 23-28 of appellee's opening brief, including that of the Court of Appeals of the 8th Circuit, distinctly holding that the grant of the right to a vein carries with it by implication the incidental right of cutting into and removing the strata overlying and underlying the vein and all other incidental rights reasonably necessary for the beneficial use and enjoyment of the vein, are directly in point.

IV.

THE COURT BELOW EXERCISED DISCRETION IN REFUSING TO ISSUE AN INJUNCTION.

At top of page 12 opposing counsel in their reply brief state that counsel for appellee concede that "the court below did not exercise any discretion in arriving at his decision", etc. Such a concession has never been made. The court below had before it the bill of complaint and the answer, the Sizer affidavit and the counter-affidavit of Connor filed long before the hearing on the application for a preliminary injunction and it exercised full discretion in refusing to issue the injunction *pendente lite.*

Counsel on page 13 of their brief seek to evade the force of the *St. Louis Trust Co. v. Galloway Coal Co.* case by stating that a final hearing was there involved and no preliminary injunction was involved. In our humble opinion this fact makes this authority holding that the public interest should always be kept in mind, infinitely more powerful. If the public interest is to have weight on a final determination then there is all the greater reason why it should be given every consideration on a preliminary hearing, especially where the party seeking the injunction cannot possibly be injured to the extent of one cent's worth of actual damage pending the litigation, if the injunction be refused.

V.

APPELLANT'S MOTIVES.

Appellant's motives in attempting to enjoin appellee from conducting reasonable mining operations beneath the surface of appellant's mining claims are unmistakable. At the top of page 17 of their reply brief counsel frankly admit that appellant's purpose is to make the mining of the vein, which is the property of appellee, so unprofitable that appellee's investment would be destroyed and no more capital would consequently be invested because the returns would not justify further operations. Counsel are mistaken in representing as they do on the same page that appellee claims the right

> "to go underneath the surface of our [appellant's] premises, and do with it exactly as they pleased under the pretense that their acts were reasonably necessary to the economical mining of the vein".

Such a statement is a gross perversion of appellee's contention. All that appellee claims is a reasonable latitude in mining in and upon its vein in a common sense manner such as is customary wherever mining is carried on and it is supported in its claim of this incidental and implied right to cut into the neighboring overlying and underlying strata by both reason and eminent authority.

VI.

THE INCIDENTAL RIGHTS HERE INVOLVED ARE APPURTENANCES.

Counsel thoroughly misconceive the nature of the incidental and implied rights accompanying a specific grant such as those here involved. The authorities cited on pages 23-28 of appellee's opening brief should be in themselves sufficient to satisfy anyone that *such incidental rights exist whatever they may be termed.* They are not, however, classified as easements as counsel would lead us to infer from their discussion found on pp. 19-20. They are incidental or appurtenant rights, though in some cases called "secondary easements", which is a correct designation in some instances, for easements often pass by implication as appurtenant to the main grant. While the proposition that such rights are appurtenances is elementary, since

counsel has raised the question, it may be well to call attention to the following definitions of appurtenances: "appurtenances" include such incicidental rights to land as "are reasonably necessary for its proper *enjoyment*" (*27 Cyc.* 1143) the "right to work mines" being included (*id.* note 19).

> "Generally anything necessary to the *enjoyment* of the land".
>
> *4 Corpus Juris,* 1467, note 33 (c).

> "The transfer of a thing transfers all its incidents and appurtenances".
>
> *McShane v. Carter,* 70 Cal. 310;
>
> *Cal. Civil Code,* Sec. 1084.

> "A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit" * * *.
>
> *Cal. Civil Code,* Sec. 662.

Also see the annotations under this section in Kerr's Codes of California, among which is the statement that a

> "mining right granted carries with it by implication *and without express grant* whatever is necessary to beneficial enjoyment", citing authorities.

That it is not necessary to specify these incidental and appurtenant rights in the grant see Sec. 1084, *Cal. Civil Code.*

They pass with the thing granted "without the words *cum pertinentiis* or any such like words".

> *Sheppard's Common Assurances* (Touchstone, 1648 A. D.), p. 89.

"These incidental rights of the miner, *which are appurtenant to the grant of the mineral rights,* are to be gauged by the necessities of the particular case, and therefore vary with changed conditions and circumstances. He may occupy so much of the surface, adopt such machinery and modes of mining, and establish such auxiliary appliances and instrumentalities, *as are ordinarily used in such business, and may be reasonably necessary for the profitable and beneficial enjoyment of his property.* But he is not limited, as we have already said, to such appliances as were in existence when the grant was made, but may keep pace with the progress of society and of modern invention".

Williams v. Gibson, (Ala.) 4 Southern 350.

VII.

CONCLUSION.

Counsel for appellant are evidently not as confident of their position as they might be, for on page 22 of their reply brief they concede the possibility that this court may decide "that appellee has the right to go outside the vein" and in that event the question of a "reasonable necessity" for so doing would become important. They claim that appellee has made no showing of the existence of a reasonable necessity. In the face of the *uncontradicted* and numerous affidavits filed by appellee establishing this fact, such a statement is unworthy of reply. They claim that the showing made by appellee is merely that the vein can be mined more economically and profitably by means of such work-

ings. It is unnecessary to cover this ground again and show that reasonable necessity includes economic and profitable operation (see authorities cited on pages 23-32 of appellee's opening brief. These authorities could be multiplied indefinitely).

It is quite evident that appellant desires to put appellee to as much trouble and annoyance and expense as possible and hence the suggestion found on page 23 of appellant's reply brief that "even though the court should hold that appellee is given the right to go outside the vein, the injunction should be granted, etc". Think of it! It is virtually a claim that even though the grounds for an injunction do not exist, yet an injunction should be issued. And for what purpose? So that appellant might exercise constant espionage and control over appellee's operations. If appellant is justified in making this preposterous claim, then, every time an apex proprietor crosses the vertical side boundary of his claim and commences to mine extralaterally, the adjoining owner of the overlying surface would be entitled to the issuance of a similar injunction. And what a burden would be imposed on the courts if such a startling doctrine should prevail! As was said in a case involving a somewhat similar situation where the court refused to grant an injunction:

> "The evidence shows there is no rule by which a court can specify in what manner the work shall be done, how much coal shall be removed, or what size the rooms shall be, as all these matters depend upon the conditions as

they are found in the different portions of the mine * * *

"It is largely a question of engineering, and courts will encounter great difficulty in assuming, and will only in rare cases, where the remedy at law is so inadequate as to render such course necessary, assume charge of the operation of such work and direct the manner in which it shall be done."

Lloyd v. Catlin Coal Co., 71 N. E. (Ill.) 335, 339.

Extralateral mining wherever carried on, and that means throughout the entire West, will be profoundly and seriously affected if appellant's contention prevail. With every confidence that this court will never sanction so severe a blow to the mining industry, this brief is respectfully submitted.

Dated, San Francisco,
November 14, 1918.

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